HIRING & FIRING

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HIRING: EMPLOYEE OR INDEPENDENT CONTRACTOR?
HIRING EMPLOYEES:  
AN OVERVIEW OF ANTI-DISCRIMINATION LAWS
Independent Contractors and Employees Defined

Independent Contractors
A worker who is self-employed, contracts to do a piece of work according to his or her own methods, and is subject to an employer’s control only as to the end product or final result of the work performed.
Independent Contractors and Employees Defined

**Employee**

A worker in the service of another where the employer has the power or right to control and direct the worker in the material details of how the work is to be performed.
Why Does the Classification Matter?

- Scrutiny from Various Agencies
  - IRS
  - U.S. Citizenship & Immigration Services
  - NLRB
  - DOL
  - OSHA
  - Unemployment and Work Comp Divisions

- Taxes
- Wages
- Benefits
- Penalties
- Civil liability
  - Microsoft cases
- Criminal consequences
Multiple Tests and Definitions

- Economic Realities Test (typically FLSA)
  - Federal minimum wage/overtime
  - Is individual economically dependent on business to which services are provided or is individual in business for herself?

- Right of Control Test/Common Law Test (IRS)

- Hybrid Test (typically discrimination context)

- Remedial Legislation Test (unemployment/work comp/specific statutes)
The IRS uses a 20 factor “right of control” test to determine if a worker is an independent contractor or an employee.
20 Factor “Right of Control” Test

continued

- Instruction
- Training
- Integration of the worker’s services into business operations
- Services rendered personally
- Hiring, supervising and paying assistants to help a worker
- Continuity of relationship
- Scheduling and set hours
- “Full-time” or “part-time” status
- Performance of work on employer’s premises
- Performance of work in a set order or sequence
- Regular submission of oral or written reports
- Method of payment
- Payment of business and/or traveling expenses
- Furnishing tools and materials
- Investment in equipment or facilities
- Realization of profits and losses
- Working for multiple employers
- Services available to general public
- Dismissal for reasons other than non-performance of contract
- Termination of relationship without liability for non-performance of contract
20 Factors Reduced to Three Indicators of Control

- **Behavioral Control**
  Training, instructions, location, hours and duration of work. Suggestions are not training or instructions.

- **Relationship Between the Parties**
  Employee benefits, termination, intent of the parties (written contracts), permanency, and regular course of business.

- **Financial Control (Economic Realities)**
  Distribution of profits and losses, significant investments in materials and equipment, unreimbursed expenses, services available to the public and method of payment.
Economic and Legal Ramifications

- Tax Liability
  - FICA, FUTA, Personal Income Tax
- Penalties
- Third Party Liability
- Liability to Employees and Contingent Workers
Types of Liability to Employees and Independent Contractors

- Workers compensation laws
- The Fair Labors Standards Act
  - Overtime pay
  - Personal liability
  - Collective, class actions
- Employee benefit plans
- Some state and federal statutes prohibiting discrimination, harassment and retaliation
Pointers to Consider Regarding Employee or Independent Contractor Status

✓ Maintain written agreements.
  - State nature of relationship
  - Explain rights to control method of work, hours, dress, hiring of staff/employees, how project is to be accomplished
  - Explain obligation to use own equipment, bear responsibility for all costs and expenses, bear liability for all taxes
Pointers to Consider continued

✓ Maintain written agreements continued
  • Expressly exclude contingent worker from employee benefits
  • Include indemnification provisions
  • Make agreement arms length
ANTI-DISCRIMINATION LAWS

- “Bases” for discrimination
- “Issues” of discrimination
- “Theories” of discrimination
PRE-EMPLOYMENT INQUIRIES
(JOB APPLICATION AND INTERVIEWS)
PROHIBITED INQUIRIES

- Employers may not ask applicant questions that elicit information that cannot be considered in making a hiring decision
- FEHA presumes prohibited information was factor in hiring
PROHIBITED INQUIRIES

- Questions eliciting information about race, sex, national origin, age, religion, disability, marital status, citizenship, color disability, sexual orientation
PROHIBITED INQUIRIES

Examples:
- Date of birth or school attendance
- “are you a citizen?”
- Name and address of ‘relative, spouse or children”
- Organizations, clubs, societies to which applicant belongs
- Provisions for child care
- Questions “likely to elicit information about a disability”
PROHIBITED INQUIRIES

Examples from EEOC Regulations:

- No questions about ability to perform “major life activities”
- No questions about whether applicant will need reasonable accommodation to do the job
- No questions about medical or workers’ compensation history
- No questions about lawful drug use
Examples from EEOC Regulations:

- May ask if applicant can perform specific job functions
- If disability is “known” may ask applicant to demonstrate or describe how task would be performed
- “Arrests” not leading to convictions
- Credit histories
EMPLOYMENT APPLICATIONS
AND JOB INTERVIEWS
EMPOYMENT APPLICATIONS

- Inquiries sufficient to avoid “negligent hiring” claims
- No comments that could create an “implied contract”
APPLICANT INTERVIEW FORMS

- Same restrictions as applications
- Avoid discrimination by establishing uniform standards
- Develop forms/documentation to reflect:
  - Uniform questions for all applicants
  - Uniform selection criteria
  - Uniform interviewers/decision makers
JOB OFFER LETTERS

- “Merger” clause
- “At-will” reference or disclaimer
- Avoid specific period of employment
- Incorporate terms of handbook
- Do you want to create a contract?
EMPLOYERS & LAWYERS, WORKING TOGETHER

FIRST CLASS SERVICE, COAST TO COAST

QUESTIONS ABOUT HIRING?
WHAT IS “AT-WILL” EMPLOYMENT?

- Presumption, absent an agreement to the contrary, that employees and their employers are each free to discontinue their employment relationship at anytime, for any reason, with or without notice
- Labor Code § 2922 codified the “at-will” presumption in California
DOES “AT-WILL” EMPLOYMENT STILL EXIST IN CALIFORNIA?

- The Reality: ability to freely discharge employees increasingly restricted
DOES “AT-WILL” EMPLOYMENT STILL EXIST IN CALIFORNIA?

Three categories of restrictions upon California’s employers’ rights to freely discharge employees:

1. Statutes
   - Anti-discrimination laws
   - Whistleblower protections
   - Protections against discharge for jury duty or political activity
DOES “AT-WILL” EMPLOYMENT STILL EXIST IN CALIFORNIA?

2. Contracts
   - Private contracts
   - Express or implied

3. Public Policy
   - Public policy exceptions
   - Breach of express or implied contract
   - Breach of implied covenant of good faith and fair dealing
ADMINISTERING PERSONNEL POLICIES TO MINIMIZE EXPOSURE TO WRONGFUL TERMINATION CLAIMS

- Enforce strict at-will employment practices
  - Employment applications
  - Offer letters
  - Express employment contracts
AVOID COMMON TERMINATION MISTAKES

- Giving a reason which later proves false or inaccurate
- Termination violates company practice or policy
- Bad documentation
ASSESSING FOR “HIGH RISK” TERMINATION FACTORS

- Employee is in one or more protected groups or is “long term”
- Employee history of claims against the company or others
- Supervisor has a “history”
ASSESSING FOR “HIGH RISK” TERMINATION FACTORS

- Is on or has recently returned from a statutorily authorized leave (FMLA/CFRA; ADA; Workers’ Comp)
- Employee has recently complained
- Giving a reason which later proves false or inaccurate
MINIMIZING RISKS OF TERMINATIONS: CONSIDER ALTERNATIVES

- Demotions
- Training
- Lateral transfers
- Delay termination to create better documentation
THE USE OF SEVERANCE AGREEMENTS TO MINIMIZE EXPOSURE TO WRONGFUL TERMINATION CLAIMS

- Severance agreements
  - General releases
  - Specific release of age discrimination claims
  - Provide consideration
  - Non-waivable claims
THE USE OF PERFORMANCE EVALUATIONS TO MINIMIZE LIABILITY

- Maintain record of employer efforts to provide employee with notice of deficiencies and opportunities for improvement
- Evaluations should be accurate and effective
  - Establish performance standards which are job-related, objective and clear
  - Evaluate at regular intervals
THE USE OF PERFORMANCE EVALUATIONS TO MINIMIZE LIABILITY

- Managers must know how to properly administer evaluation system
  - Avoid “subjective” criteria
  - Evaluate strictly based on employee’s actual responsibilities
USE OF TERMINATION LETTERS TO AVOID LIABILITY

- Carefully state reasons for termination
- Dates and subject matter of prior warnings/discipline
- Benefits to which employee is entitled
- Ability to appeal or review
- Last day of work/exit interview
- Final paycheck/company property
CONDUCT EXIT INTERVIEW TO AVOID LIABILITY

- Conduct meeting in private
- Avoid having “antagonizers” present
- Have a second manager attend
CONDUCT EXIT INTERVIEW TO AVOID LIABILITY

- Be brief (15 minutes should do it)
- Avoid “escorting”
- Arrange exit interview (if appropriate)
- Provide termination letter (if appropriate)
THANK YOU
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